

**Opening Statement of the Honorable Ed Whitfield**  
**Subcommittee on Energy and Power**  
**Hearing on “EPA’s CO2 Regulations for New and Existing Power Plants: Legal Perspectives”**  
**October 22, 2015**

*(As Prepared for Delivery)*

Two weeks ago we reviewed the substance of EPA’s CO2 regulations for new and existing power plants, all 3,000 pages of them, with EPA Assistant Administrator Janet McCabe. Today we continue our scrutiny of these rules as the agency begins the process of imposing its requirements on the states.

Today’s hearing will focus on the legality of this complicated and far-reaching scheme to commandeer each state’s electricity system and replace it with a cap-and-trade approach similar to the ones that Congress has repeatedly rejected.

There is nothing in the Clean Air Act that even suggests such sweeping agency action is authorized. Indeed, these rules are unprecedented in the 45 year history of this statute. If Congress wanted to authorize a comprehensive transformation of the way America gets its electricity in order to address global warming, it would have said so. If Congress wanted to see a wholesale federal takeover of state authority on electricity policy, it would have said so. And if Congress wanted to largely write fossil fuels out of America’s energy future, it would have said so as well.

In my view, the discrepancy between what EPA is trying to do and what the Clean Air Act actually allows is so wide that I am confident that these rules will not withstand judicial scrutiny. There are also serious Constitutional concerns with what many see as an Executive branch power grab at the expense of the legislative branch and the states.

I might add that some of the same reasons EPA’s power plant rules are bad law are also the reasons they are bad policy, particularly in the way the agency treats the states. The 1970 Clean Air Act set out a working partnership between the federal government and states stating quite clearly that air pollution prevention and control are the primary responsibility of state and local governments. In contrast, unilateral EPA micromanagement of electricity generation is a recipe for higher bills, reduced reliability, and job losses that are well out of proportion to any environmental benefits.

The fact that 16 states believe they have no choice but to sue the agency over these rules is a sure sign of an unhealthy federal-state relationship and a policy that won’t work. The House passed the Ratepayer Protection Act to address the legal and policy shortcomings of the rule for existing power plants. This bill would extend the state compliance deadlines so that the rule’s costly provisions would not take effect until judicial review is complete.

The value of this “time out” was clearly demonstrated by the recent Supreme Court decision finding EPA’s Mercury MACT rule to be legally flawed. Unfortunately, this decision came after many affected utilities had already initiated costly compliance steps, including the irreversible decision to close several coal-fired power plants. Similarly, the existing source rule as written would require costly and potentially irreversible steps to be taken before we know the legal status of the rule. I believe that the EPA has made clear by their comments following this decision that their goal is to compel states to begin complying with the existing plant rule now so

that in the event that the Supreme Court rules against them, decisions will have already been made.

The whole regulatory scheme before us today rests on an implicit deception – a bait and switch. The plain words of the statute make clear the limited authority EPA has to regulate performance standards for fossil-fueled power plants. But rules before us, as we'll hear today, go well beyond mere performance standards. In the guise of performance standards the agency has created a compliance schedule and complicated incentive scheme that lock states into making expensive and far reaching choices concerning their electricity systems as soon as possible, before the long term implications of their decisions can be evaluated, or the long term implications of EPA's regulatory over reach can be understood.

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